United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6199
77-4176

United States Court of Appeals

FOR THE SECOND CIRCUIT

GENERAL MOTORS CORPORATION, A Corporation of the State of Delaware,
Plaintiff-Appellee,

—against—

THE LONG ISLAND RAIL ROAD COMPANY, A Corporation of the State of New York,
Defendant-Appellant.

THE LONG ISLAND RAIL ROAD COMPANY,
Third Party Plaintiff-Appellant,

—against—

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION
Third Party Defendants-Appellees,

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
Intervening Third Party Defendant-Appellee.

On Appeal From The United States District Court For The Eastern District Of New York.

(Additional titles appear on reverse side of this cover)

BRIEF OF PLAINTIFF-APPELLEE GENERAL MOTORS CORPORATION

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THE LONG ISLAND RAIL ROAD COMPANY,
Appellant,

—*against*—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From The Interstate Commerce Commission.

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On Appeal From The Interstate Commerce Commission.

BRIEF OF PLAINTIFF-APPELLEE GENERAL MOTORS CORPORATION

STATEMENT OF THE CASE

By Order dated October 17, 1977, this Court, in response to a Motion of Defendant-Appellant-Petitioner, The Long Island Rail Road Company, hereinafter referred to as Appellant, consolidated that party's appeal in Docket No. 76-6199 with its appeal in Docket No. 77-4176. Whereas Docket No. 76-6199 is an appeal of the Decision and Order of The Honorable Jacob C. Mishler, United States District Judge, Eastern District of New York, and Docket No. 77-4176 is an appeal of the Decision and Order of the Interstate Commerce Commission in Docket No. 36516, *Switch Connection Charge at Bethpage, N.Y., Long Island Rail Road,* 355 I.C.C. 201 (1977), both cases involve substantially the same if not closely related issues which were decided initially by the Interstate Commerce Commission.

The action before Judge Mishler was brought by Appellant to set aside and annul orders of the Interstate Commerce Commission, hereinafter referred to as the Commission, entered in Docket No. 35790, *Joint Petition for Declaratory Order-Private Sidetrack-General Motors Corporation and The Long Island Rail Road Company,* 351 I.C.C. 691 (1976). It was initiated as an action in the United States District Court for the Eastern District of New York on November 14, 1977 upon complaint filed by Plaintiff-Appellee General Motors Corporation, hereinafter referred to as Appellee. Appellee brought the action to obtain a temporary restraining order enjoining Appellant from halting rail service as threatened at Appellee's Bethpage, New York warehouse and distribution facility. A temporary restraining order was granted on December 7, 1972 and remained in effect pending resolution by the Commission of the rights and duties of Appellant and

Appellee regarding a rail track switch connection at Bethpage, N.Y. As part of that temporary restraining order, both parties were directed to submit the matter in dispute to the Commission. Thereafter, on February 6, 1973, the parties filed with the Commission a Joint Petition for Declaratory Order.

The dispute arose after Appellant threatened to discontinue rail service to the Bethpage site if Appellee did not promptly enter into an agreement reimbursing Appellant for the maintenance of that part of the track switch connection owned by and located on Appellant's right-of-way. Appellee refused to enter such an agreement on the grounds that Appellant is obligated to provide and maintain such facilities as a common carrier under its freight rate structure, other railroads do not require reimbursement for this maintenance expense, and collection of a separate maintenance charge would constitute double payment for the same service.

On May 21, 1974, the Initial Decision was rendered by the Administrative Law Judge. He concluded that (1) the switch connection is part of Appellant's overall transportation service and must be maintained with line-haul revenues, (2) the present line-haul rates include delivery to Appellee's sidetrack, (3) any new maintenance charge would be a rate increase not lawfully published in Appellant's tariff, and (4) as long as Appellee furnished sufficient freight business, Appellant was obligated to operate and maintain the switch connection. The Administrative Law Judge also found that under these circumstances, Appellant could neither impose the new maintenance charge nor terminate service to Appellee (224a).[1]

[1] Parenthetical references are to the pages in the Appendix where the source material is located.

Thereafter, Appellant filed exceptions to the Initial Decision and on June 17, 1975 Division 3 of the Commission adopted and affirmed the statement of facts, conclusions and findings of the Administrative Law Judge and issued an Order discontinuing the proceedings.

Next, Appellant asked the Commission to reconsider the matter, and upon reconsideration Division 3 elaborated upon its earlier decision. The Commission, speaking through Division 3, held that Appellant had not established that line-haul rates "do not fully compensate it for maintenance of the switch connection at issue," that Appellant had not established the reasonableness of the additional maintenance charge, and that Appellant had neither alleged nor proved any adverse change in the practicability, safety, or sufficiency of business to and from Appellee's Bethpage sidetrack (308a-09a).

Appellant then filed a third-party summons and complaint against the United States and the Commission in the action pending before the United States District Court for the Eastern District of New York (311a). Subsequently oral argument was heard and on November 19, 1976, Judge Mishler issued a Decision and Order permanently enjoining Appellant from not serving Appellee's private siding at Bethpage (482a). It is this Decision and Order that Appellant has brought before this Court in Docket No. 76-6199.

One day prior to filing that appeal, Appellant filed its Freight Tariff No. 72 to become effective January 15, 1977, publishing a per-car maintenance charge of $4.39 on each rail car of freight delivered to Appellee at Bethpage.

The tariff publication was protested by Appellee and the Commission was asked to make a formal investigation of the matter. The Commission refused to suspend operation

of the tariff, but did institute an investigation of the new rate. Both parties presented evidence under modified procedure and on August 26, 1977, Division 2 of the Commission issued its Report and Order finding that Appellant had not shown the maintenance charge to be just and reasonable (785a). In reaching that conclusion Division 2 properly reasoned that (1) "the primary issue is whether the establishment of a separate charge for services previously performed as a part of the line-haul rates is just and reasonable;" (2) that reasonableness of the proposed charge could not be properly determined without considering the reasonableness of the line-haul rates; (3) that Appellant had the burden to prove the reasonableness of the rate increases; and (4) that Appellant failed to meet that burden of proof. This was followed by Appellant's Petition for Judicial Review of that Report and Order which led to Docket No. 77-4176.

STATEMENT OF FACTS

In 1965 Appellee constructed a warehousing facility in Bethpage, Long Island adjacent to the tracks of Appellant. At about the same time, Appellant constructed the necessary track connection from its main line to Appellee's private industrial tracks in response to a request from Appellee (717a). Appellee normally receives approximately 10 to 15 rail freight cars of auto parts every week at its Bethpage facility from various origins in the East and Midwest. These cars are delivered by Appellant over the track connection to Appellee's private industrial sidetracks. All rail carloads are moved from origin to destination in accordance with line-haul freight rates published in tariffs on file with the Interstate Commerce Commission. These

line-haul rates entitle each rail carload to be delivered by Appellant to Appellee's usual place of unloading (719a).

On or about October 30, 1972, Appellant threatened to place out of service on November 15, 1972, the switch track connection unless Appellee executed a sidetrack agreement which would, among other things, obligate Appellee to maintain the switch connection, tracks, and other facilities owned by Appellant and located entirely on Appellant's right-of-way (135a). For reasons set forth in the above Statement of The Case, Appellee was unwilling to agree to such terms and the instant litigation was begun.

STATEMENT OF ISSUES PRESENTED

1. Did the Court below commit any error of law in affirming the decision of the Commission in I.C.C. Docket No. 35790 and in permanently enjoining Appellant from ceasing rail service to Appellee?
2. Is there a rational basis for the decision of the Commission in I.C.C. Docket No. 36516?

The answer to both questions is in the affirmative.

ARGUMENT

Did the Court below commit any error of law in affirming the decision of the Commission in I.C.C. Docket No. 35790 and in permanently enjoining Appellant from ceasing rail service to Appellee?

At the outset Appellee wishes to point out that Appellant has not presented to the Court the proper standard of review. The thrust of Appellant's grounds for judicial review is that the Court below and the Commission failed

to properly interpret Section 1(9) of the Interstate Commerce Act; and in misinterpreting the statute, both tribunals refused to allow the railroad to recover maintenance costs of the switch connection at Bethpage. In making those arguments, Appellant would have this Court retry both cases before the Commission and reverse the Court below without pointing out a single error committed by either tribunal. Appellee does not believe there is any merit in either appeal, as will hereinafter be demonstrated in this reply.

The starting point for judicial review of a Commission Order is 5 U.S.C. Section 706(2)(A): "The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." The Supreme Court has specifically and definitively addressed this aspect of statutory construction and has formulated a scope and standard that severely limit the extent of judicial review of an I.C.C. decision to the single determination of whether the conclusions reached by the Commission "are rationally supported." Thus in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972) the Court said:

> "The standard of judicial review for actions of the Interstate Commerce Commission in general, *Western Chemical Co.* v. *United States,* 271 U.S. 268 (1926), and for actions taken by the Commission under the authority of the Esch Act in particular, *Assigned Car Cases,* 274 U.S. 564 (1927), is well established by prior decisions of this Court. We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and

> we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported. . . ." (pp. 748-49)

See also: *Illinois C. R. Co.* v. *Norfolk & W. R. Co.*, 385 U.S. 57, 66, 69 (1966); *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 619-21 (1966); *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, 488 (1951); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535, 1946); *Virginian Ry.* v. *United States*, 272 U.S. 658, 663 (1926).

The scope of that review was recited, recognized and adhered to by the Court below at page 5 of the Memorandum Decision and Order of Mishler, Ch.J. (484a-85a). Thereafter, the Court found that the only issue before it was to determine whether the Commission correctly interpreted and applied the relevant statute, Section 1(9) of the Act. Analyzing the statute, the Court correctly summarized its meaning as follows:

> ". . . . This statute requires any common rail carrier to construct and maintain on reasonable terms a switch connection between the railroad's own tracks and the private sidetrack of an interstate shipper, provided the switch connection 'is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same.' If the shipper's application to the railroad for a switch connection is refused, the shipper can request an investigation by the ICC, which, after making findings of practicability and safety, may order the carrier to construct the switch connection." (486a)

The foregoing quoted summary is the only plausible and literal interpretation of this statute.

The Court then analyzed the critical conclusion of the

Commission in its final decision on reconsideration (302a) and held that those findings were supported by substantial evidence (486a-87a). The Court also discussed the same contentions made by Appellant there that it makes here, i.e., "§ 1(9) requires the shipper to assume the maintenance charges; that a carrier is not required to recoup the cost of maintaining a switch connection from its line haul rates; and that the imposition of separate maintenance costs is necessary to avoid discriminating against other shippers" and found those arguments unpersuasive (487a-88a). In affirming the Commission's decision, the Court specifically found that the Commission's conclusion as to the adequacy of compensation was supported by substantial evidence and that its interpretation of Section 1(9) was not unreasonable. These findings are consistent with both the statute and the evidence of record demonstrating the complete lack of substance to Appellant's first argument.

Various other contentions by Appellant are equally without merit. For instance, Appellant would have this Court believe that the law requires shippers to enter into sidetrack argeements, and that it was unlawful and unreasonable for Appellee to refuse to excute an agreement with the railroad which would compel Appellee to pay again for the maintenance of railroad-owned facilities which are a part of the carrier's general system. There is no such imposition by law upon a user of rail service and it is noteworthy that Appellant has not cited any authority in support of that contention.

Industrial sidetrack agreements are a product of tradition—not of law—are not compulsory, and are not executed unless the parties can agree upon terms which should be bilaterally beneficial. Here, Appellee could not come to terms on the maintenance provisions which it considered

to be unilaterally beneficial to only the railroad. Despite that, however, it should be clearly understood that nothing in Section 1(9) of the Act, or in any other statute, makes construction of a switch connection in any way conditioned upon the execution of a formal sidetrack agreement.

Instead, the Commission has held that the law places upon the carrier the obligation to receive, transport, and deliver freight which is offered to the usual place of unloading, whether on public or private sidings. This carries with it the incidental obligation to provide for the use of the public such terminal facilities, including switch connections, as are reasonably necessary. These general principles were enunciated by the Commission in *Propriety of Operating Practices-Packing Sheds,* 246 I.C.C. 273, 282-83 (1941). With regard to the responsibility for maintaining such facilities, the Commission said:

> ". . . they are part of the carriers' general facilities provided for the use of the public pursuant to their obligation to receive property for transportation, *and that compensation for the use which is made of them by shippers is included in the freight rate.*" (Emphasis supplied) (p. 283)

See also: *Split Deliveries and Drayage Allowance at New York,* 245 I.C.C. 40, 41 (1941); *Valley & Siletz R.R. Co.* v. *S. P. Co.,* 53 I.C.C. 397, 399 (1919); *Klamath County Chamber of Commerce* v. *S. P. Co.,* 74 I.C.C. 207, 213 (1922).

As the Commission properly pointed out in its Report and Order Upon Reconsideration, 351 I.C.C. 691:

> ". . . maintenance costs are usually chargeable to operating expenses, form a part of the rate base and are recovered from operating revenue produced by the rates for delivery over a switch con-

> nection. An additional charge for maintenance of switch connections could result in overcompensation for the maintenance of such connections." (308a)

Thus, this finding is consistent with the longstanding rule of transportation law that the task of delivering freight is an integral part of the common carrier's transportation obligation, and therefore the delivery of freight is a service performed under a carrier's line-haul rates.

Another implausible argument is that the Commission and the Court prohibited Appellant from receiving adequate compensation to maintain its facilities. To the contrary, neither tribunal made any such holding. The Commission found in both cases that Appellant had not sustained the burden of proof imposed upon a railroad in this type of situation by the Supreme Court. Specifically the Commission's finding in this regard in 351 I.C.C. 691, 697-98 is that:

> ". . . The respondent in this proceeding has not established that the line haul rates do not fully compensate it for the maintenance of a switch connection at issue. Nor has respondent established the reasonableness of the additional maintenance charges. See *Atchison, T. & S. F. Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973)." (308a-09a)

That fine point was recognized and affirmed by the Court below as follows:

> "In the final analysis, the point is not that the LIRR is precluded from recovering the costs of the switch connection by either an increase in the line haul rates or a separate reasonable maintenance charge, but that it has failed to demonstrate that it currently is undercompensated for these costs. This was the conclusion of the Commission, and we find that there was substantial evidence in the record to support it. [Footnotes omitted]" (491a-92a)

Subsequently, in 355 I.C.C. 201, 213-14, Division 2 of the Commission concluded:

> "Respondent has failed to substantiate that the maintenance charge of $4.39 per car is a reasonable charge for the cost of maintenance of the switch connection at Bethpage. Specifically, respondent has not introduced any evidence on the record to support either its estimate of the cost for inspection, lubrication, and snow removal ($600 per year), or its estimate of the cost for general maintenance of the switch ($600 per year). Thus, no determination can be made from the evidence of record as to the adequacy or accuracy of either estimate.
>
> * * *
>
> "Thus, the charge of $4.39 per car has not been properly supported by respondent and from the evidence presented we are unable to determine what a reasonable level for a maintenance charge would be." (797a-98a)

When then is the burden of proof upon a railroad in this type of situation? The evidentiary obligations were defined by the Supreme Court in *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800 (1973) as follows:

> ". . . The rule, in this regard, is that the railroads must demonstrate both that the proposed charge is reasonable in light of the costs of the separate service, and that the total charge for line haul plus the separate service is reasonable." (p. 811)

That rule was correctly recited and followed by the Commission in both of its decisions—351 I.C.C. 691 (308a-09a) and 355 I.C.C. 201 (794a). This problem there does not lie with any error being committed by either the Commission or the Court—Appellant simply did not meet the evidentiary standard set up by the Supreme Court.

Is there a rational basis for the decision of the Commission in I.C.C. Docket No. 36516?

Under Point II of its Brief, Appellant either disregards or completely ignores the pertinent issue regarding the rule of law as to a railroad's burden of proof in justifying the reasonableness of a separately established charge and erroneously argues that the Commission should have been persuaded by the total system freight deficit of Appellant and that its records did not provide the precise cost of maintaining the switch connection at Bethpage.

In the first place, as pointed out by both the Commission and the Court, the total system freight statistics are immaterial and inconclusive insofar as evaluating the reasonableness of a new service charge to be applied in addition to the specific line-haul rates. Secondly, such statistics do not satisfy the rule of measuring reasonableness in this type of situation as laid down by the Supreme Court in *Wichita Bd. of Trade, supra.* Third, the weak excuse by Appellant that the data is not available was considered and rejected by the Commission in 355 I.C.C. 201, as follows:

> "Protestant has asserted that respondent should not have estimated the construction cost of the switch connection since the actual construction costs should be available. In addition, protestant has questioned the inclusion of such costs as 'depreciable construction costs,' since the cost of rail and track material cannot be depreciated.
>
> "In this regard, we agree with protestant. Respondent should have been able to produce actual construction costs, rather than relying on current replacement costs to develop an estimate of 1965 construction costs. In addition, protestant is correct in its assertion that such costs are not depreciable." (798a)

Another infirmity in Appellant's argument under both Points I and II is the lack of appropriate legal precedent. Only two cases are cited but they are the same two cases which have been considered previously and found not to be in point by both the Commission and the Court.

In this regard, Appellant continues to rely on decisions of the Commission in *Merchants Refrigerating Co.* v. *New York Central R. Co.*, 238 I.C.C. 599, and *Allied Container Corp.* v. *Maine Central R. R.*, Docket No. 36143. In 351 I.C.C. 691 the Commission distinguished *Merchants Refrigerating Co.* from the instant case and explained in detail why Appellant had misplaced reliance on the earlier decision. In its Memorandum Decision and Order, the Court below recognized that the *Merchants Refrigerating Co.* case actually supported Appellee's position that maintenance costs form a part of the rate base and are recovered from operating revenue produced by the line-haul freight rates for delivery over a switch connection (489a). Also, both the Commission and the Court considered the *Allied Container Corp.* case and could not find that it would compel a different result in the instant situation. Appellant presents no new argument why either of those cases provides authority to reverse the decisions of the Commission and the Court in the case at bar.

CONCLUSION

The findings made by the Commission in both proceedings were adequate, were based on substantial evidence, were in accord with prior decisions of the Commission, met and successfully refuted all contentions and allegations of Appellant.

It has long been held that an order of the Commission not alleged to be unconstitutional and within its authority and supported by evidence cannot be set aside by the courts, and that a strong presumption exists in favor of the correctness of the Commission's decisions in its limited field. *Pennsylvania Co.* v. *United States,* 236 U.S. 351, 361 (1915); *Seaboard Air Line Railroad Co.* v. *United States,* 131 F. Supp. 129, 132 (E.D. Va. 1954), affirmed 349 U.S. 902 (1955), *rehearing denied* 349 U.S. 941 (1955).

When the Commission resolves a question within its primary jurisdiction, its resolution should not be set aside unless it exceeds the Commission's statutory authority or is unsupported by the weight of the evidence. *Locust Cartage Co.* v. *Transamerican Freight Lines, Inc.,* 430 F.2d 334, 341 (1st Cir. 1970), *cert. denied* 400 U.S. 964.

In reviewing a Commission decision, the court's function is to insure that the Commission did not act in an arbitrary or capricious manner; that the decision is supported by substantial evidence in the light of the record considered as a whole; and that the decision was reached in accord with lawful procedure. *Illinois C. R. Co.* v. *Norfolk & W. R. Co.,* 385 U.S. 57, 66, 69 (1966).

That is especially true here where essentially the same issue has been fully reviewed by the Commission on three separate occasions and the final decision and order in one proceeding has been reviewed and affirmed by the

Chief Judge of the United States District Court and there are no serious allegations that the Commission acted arbitrarily and capriciously, that any finding is unsupported by evidence or contrary to the law, or that the Commission exceeded its authority or jurisdiction. Measuring the present petitions against the appropriate standard of judicial review, the conclusion is compelled that the Commission's findings and conclusions are rationally supported and no error was shown to exist in the decisions of the Court below.

Accordingly, Appellee asks this Honorable Court to deny the petitions for review.

Respectfully submitted,

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GENERAL MOTORS CORPORATION

February 3, 1978

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New York, New York 10007

Re: General Motors Corporation v. Long Island Rail Road Company, No. 76-6199

Long Island Rail Road Company v. United States of America and Interstate Commerce Commission, No. 77-4176

CORRECTIONS IN BRIEF OF PLAINTIFF-APPELLEE GENERAL MOTORS CORPORATION

Dear Mr. Fusaro:

In accordance with a phone call to your office today, we are writing this letter to be attached to our Brief which was mailed to you on February 2, 1978. The Brief contained three printer's errors on page 12. Corrected language should read as follows:

In the second paragraph, the first word "When" should be changed to "What".

The beginning of the second sentence of the third paragraph which reads "This problem there..." should be changed to "The problem here..."

By copy of this letter, we are notifying all parties of record of these corrections.

Very truly yours,

Benson T. Buck
Attorney in Charge
of Transportation

bl

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GENERAL MOTORS CORPORATION, a
Corporation of the State of Delaware,

Plaintiff-Appellee,

v.

DOCKET NO.
76-6199

THE LONG ISLAND RAIL ROAD COMPANY,
A Corporation of the State of New York,

Defendant-Appellant

THE LONG ISLAND RAIL ROAD COMPANY,

Third-Party Plaintiff-
Appellant,

v.

UNITED STATES OF AMERICA & INTERSTATE COMMERCE
COMMISSION,

Third Party Defendants,

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Intervening Third-Party
Defendant-Appellee

THE LONG ISLAND RAIL ROAD COMPANY,

Petitioner,

v.

DOCKET NO.
77-4176

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION

Respondents

AFFIDAVIT OF MAILING

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Elizabeth J. Lennon, being first duly sworn, deposes and says that on the 2d day of February, 1978, she made

service of Plaintiff-Appellee's Brief in the above-entitled matter in the United States Mail, postage prepaid, and addressed said document to the following parties of record:

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Further deponent saith not.

Elizabeth J. Lenon

Patricia P. Arquette
Notary Public
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My Commission Expires:

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Notary Public, Wayne County, Mich.
My Commission Expires Apr. 27, 1981